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August 5, 2002

By ECFS

Jane E. Mago
General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of the Application by Qwest Communications International, Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota* (WC Docket No. 02-148)

Dear Ms. Mago:

As you may know, Touch America was denied an *ex parte* meeting in the above-referenced matter. In particular, when it contacted the Wireline Competition Bureau ("Bureau") to schedule an *ex parte* meeting, it was verbally informed that Touch America would only be permitted to meet if it provided Qwest an opportunity to attend the meeting. It was also verbally informed that the reason for the restriction was that the *ex parte* requirements governing the FCC formal complaint proceedings between Touch America and Qwest somehow affect Touch America's *ex parte* rights in this proceeding. [1] In response, Touch America sent a letter to the Bureau wherein it expressed disagreement with the decision and requested a written response of the Bureau's position as well as an opportunity to address the matter with the Office of General Counsel.[2]

Touch America never received a written response nor until now has it had an opportunity to address this matter with your Office. Instead, and upon further inquiry by Touch America, it was verbally informed that the Bureau's position was as set forth in the Enforcement Bureau's July 1, 2002 letter to AT&T whereby the Enforcement Bureau denied AT&T its *ex parte* rights

[1] Formal Complaint, *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (February 8, 2002) and Formal Complaint, *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 (February 11, 2002), revised and refiled on March 1, 2002.

[2] Letter from Daniel Waggoner, Davis Wright Tremaine LLP, on behalf of Touch America, to Michael Carowitz dated June 28, 2002.

in the Qwest/U S WEST merger proceeding.[3] Left with the alternative of foregoing its *ex parte* rights altogether, Touch America went forward with a meeting on July 24th, albeit under protest which was noted at the beginning of the meeting. Touch America was restricted to twenty-seven and one-half minutes while Qwest was not only permitted to attend and monitor the meeting, but was given equal time to present its adversarial case to the Commission.[4]

The purpose of this letter is to reaffirm Touch America's opposition to the Bureau's denial of Touch America's *ex parte* rights in this proceeding by requiring Touch America to give notice to Qwest of the July 24th meeting and by permitting Qwest to fully participate in that meeting.

As consistently and historically recognized by the Commission, the *ex parte* rules, particularly with respect to "permit-but-disclose" proceedings, are intended to provide parties the opportunity for a full and frank discussion of the issues germane to the proceeding and not to impose on the parties an oral argument, adversarial style hearing.[5] Touch America has been prejudiced in this proceeding because it has been denied that opportunity and, in the process, prevented from free and open disclosure. In other words, the very presence of Qwest clearly acted as a chill on Touch America's position which the "permit-but-disclose" rules were specifically designed to prevent.

Any change to the "permit-but-disclose" rules, such as the treatment received by Touch America, must, as specifically set forth in those rules, apply to a "particular proceeding," not to a particular issue.[6] It follows, therefore, that it must also apply equally to all participants in a proceeding for all purposes. Further, any change must be required as a matter of the "public interest" and it must be by "order, letter, or public notice."[7] The Bureau did not meet any of these rules.

Based on the July 1 letter to AT&T, the Bureau apparently barred Touch America from an *ex parte* meeting because an issue to be raised by Touch America was allegedly the same issue raised by Touch America in its formal complaint proceedings against Qwest, which are designated "restricted" proceedings. Thus, the Bureau ignored the plain language of section 1.1200(a) by transforming a "permit-but-disclose" proceeding into a "restricted" proceeding but

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[3] Letter from David Solomon, Chief, Enforcement Bureau, to Joan Marsh, AT&T Corp. dated July 1, 2002.

[4] Not even the Commission's *ex parte* rules for "restricted" proceedings impose such conditions. At most, they require the requesting party to provide the other party with "advance notice and the opportunity to be present" but nowhere do they restrict the meeting time or require or allow the other party "equal time" to present its case.

[5] *See, e.g., MCI v. Bell Atlantic Corporation*, 13 Rcd 887 (1998) and cases cited therein. *See also, Beehive Telephone, Inc. v. The Bell Operating Companies*, 12 FCC Rcd 17930, 17935 (1997) *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981).

[6] 47 C.F.R. §1.1206.

[7] *Id.* at § 1.1200(a). Any rule change must also be in accordance with the Administrative Procedure Act. *Id.* Arguably, the Bureau's actions also violate that Act by failing to follow the requisite procedures to modify the rule which is unlike a waiver that is permitted without following those procedures provided that the Commission shows "good cause" for the waiver, *i.e.*, where "particular facts would make strict compliance inconsistent with the public interest." *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

only for one issue. Moreover, the letter to AT&T relied on the definition of "presentation" found in section 1.1201(a), namely, "[a] communication directed to the merits or outcome of a proceeding . . .." The issues raised by Touch America in this proceeding, however, were not "directed to" the merits or outcome of the "restricted" complaint proceedings; instead, they were directed to the merits or outcome of this proceeding.[8] Even assuming that a modification of the *ex parte* rules for particular issues instead of a particular proceeding was proper, the Bureau has not applied its changed rule to all parties equally,[9] it has failed to state why the public interest requires the modification and it did not issue the modification by "order, letter, or public notice."[10]

The Bureau's response in this matter is particularly troubling because it is not only in violation of the Commission's rules but it is contrary to Commission precedent and at odds with the public interest purpose of the *ex parte* process. Indeed, the Commission has a history of reaching the opposite conclusion. For instance, in *MCI v. Bell Atlantic*, *supra*, and cases cited therein, the then Enforcement Division of the Common Carrier Bureau modified a complaint proceeding from a "restricted" proceeding to a "permit-but-disclose" proceeding in order to allow a "fuller exchange" of the issues that were the same issues in a related, but different "permit-but-disclose proceeding."[11] As stated by the Bureau:

> Because the MCI complaint proceeding raises the same significant and complex legal and policy issues, and because a broader exchange of views on these issues would likewise serve the public

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[8] The effect of the Bureau's position was not only to subject issues that are also before the Commission in the formal complaint proceedings to its *ad hoc* rulemaking but to subject other issues to it as well. For instance, Touch America addressed its position in this proceeding that Qwest failed to meet key performance measures and that future enforcement (*i.e.*, continued monitoring) of Qwest is not sufficient to support approval of Qwest's Application. These issues bear no relation to the facts and circumstances of the formal complaints, yet Touch America was required to present these issues in Qwest's presence and Qwest was permitted an opportunity to respond.

[9] Qwest has been permitted numerous *ex parte* filings in this matter over the past several weeks even though Touch America was not a party to those communications.

[10] The Commission cannot lean on its authority under 47 C.F.R. § 1.3 to amend or modify its rules because such authority must not only be for "good cause shown," which the Bureau failed to do, but the authority is subject to "the provisions of this chapter," *e.g.* 47 C.F.R. § 1.1200 which, as stated above, requires a public interest finding and an order, letter or public notice. Any other reading of section 1.3 would run counter to and undo the specific requirements of section 1.1200. The same reasoning, of course, holds true with any other rule the Commission may find convenient to rely on such as an expansive interpretation of the Bureau's delegated authority.

[11] *See also Beehive supra at* 17944 (footnote omitted), where the Commission not only upheld a similar ruling but, in doing so, stated that parties were not prejudiced by the modification because the only distinction between the two types of proceedings was that the party not privy to an *ex parte* presentation "was not entitled to service of written presentations or to be invited to attend oral presentations." The Commission continued by stating that the excluded party nevertheless "had virtually immediate access to all written *ex parte* presentations and summaries of all oral presentations" and had "equal opportunity to make presentations to the staff." *Id.* (Footnote omitted.) The Commission concluded by stating that the record was "fully available to all parties . . . and [its decision was] therefore consistent with the principles underlying the *ex parte* rules." *Id.* Indeed, as far back as 1965, the Commission recognized that a party to a proceeding is free to discuss issues before the Commission provided that such discussions are not used as "a pretext for *ex parte* communications going to the merits or outcome of a restricted proceeding." *Report and Order*, 1 FCC 49, 58 (1965).

> interest, the Bureau is hereby modifying the *ex parte* procedures applicable to the MCI complaint proceeding by reclassifying it as a "permit-but-disclose" proceeding subject to the disclosure requirements set forth in Section 1.1206 of the Rules. *See* 47 C.F.R. §§ 1.1200(a), 1.1206.[12]

In sum, Touch America submits that the Bureau's interpretation of its *ex parte* rules, and the manner by which it conducted the July 24th meeting with Touch America, is inconsistent with the Commission's rules as well as the public interest. Moreover, Touch America has been and continues to be prejudiced by the Bureau's actions. Accordingly, Touch America hereby requests a written response by your Office so that it may consider any actions it needs to pursue in order to protect its interests in this matter.

Sincerely,

Davis Wright Tremaine LLP

/s/
Daniel Waggoner
On Behalf of Touch America

cc: Service List (Attached)

[12] *Id.* It is inconsequential that these changes were made by the Enforcement Division as opposed to the current Enforcement Bureau. The principles remain the same regardless of what part of the Commission applies them.

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 5th day of August, 2002, a copy of the foregoing letter filed on behalf of Touch America, in Docket No. 02-148, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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